

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA L. GIBBS,

Plaintiff-Appellant,

v

RICHARD A. HALL,

Defendant-Appellee.

UNPUBLISHED

April 14, 2005

No. 258538

Gogebic Circuit Court

LC No. 01-000408-DC

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order awarding to defendant custody of their minor children. We affirm.

The parties separated in late 2001 after plaintiff accused defendant of striking the parties' minor daughter. Defendant was subsequently tried and found not guilty of child abuse. In 2002, defendant married his current wife, Ruth, and moved to Colorado. The trial court awarded defendant parenting time that year. In 2004, defendant sought to have physical custody changed to him in Colorado. There is no dispute that the children lived with plaintiff since birth and that there was an established custodial environment with plaintiff. The trial court applied the statutory best interest factors, MCL 722.23, and concluded that the children's physical custody should be changed from plaintiff to defendant. Plaintiff appeals that determination on a number of grounds.

This Court has held that three standards of review apply to custody cases:

The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

We note initially that two of plaintiff's arguments were not raised in the trial court and are, therefore, unpreserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, this Court may disregard the preservation requirement for issues of law where all necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). We will address these two arguments first.

Plaintiff argues that the trial court committed clear legal error mandating reversal because a party seeking a change in custody of a minor child must first establish either "proper cause" or "a change of circumstances." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). Plaintiff focuses on the failure of the court to make such a finding at the conclusion of the motion hearing. It is true that at the conclusion of the hearing the court stated that it found an established custodial environment with plaintiff, announced that defendant therefore had the burden of showing by clear and convincing evidence that a change in custody was justified, and analyzed the statutory best interest factors, all without reference to whether proper cause or a change in circumstances had been shown. However, we explained in *Vodvarka* that the finding of proper cause or a change of circumstances is a prerequisite to even the hearing itself. *Vodvarka, supra* at 511. Therefore, the proper focus is on whether the trial court found proper cause or a change of circumstances *before* the hearing, rather than at its conclusion.

On the basis of the record before us, however, it is impossible to determine whether the trial court considered whether a proper cause or a change in circumstances existed, and if it did, whether it erred in concluding that either existed. Thus, because the issue is unpreserved and the facts necessary to resolve it have not been presented, we will not consider it. *Steward, supra* at 554.

Plaintiff also argues that the trial court committed clear legal error mandating reversal by separating the minor children from their half-sister who resides with plaintiff. We conclude that plaintiff has overstated the law on this issue. In Michigan, courts are encouraged to keep siblings together because doing so is usually in their best interest, but we have emphasized that "if keeping the children together is contrary to the best interests of an *individual* child, the best interests of *that* child will control." *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995) (emphasis added by *Foskett*). "Indeed, unyielding judicial adherence to the notion that a child's best interests requires that siblings remain in the same household, may very well, in some cases, create a judicial straightjacket that brings an individual child's personal growth to a screeching halt." *Id.* at 12. Under the circumstances of this case, we conclude that the trial court did not err by separating the physical custodial environments of the parties' minor children and their half-sister.

Plaintiff also argues that the trial court erred when it failed to consider five statutory factors in MCL 722.31 before permitting a change to a child's legal residence of more than one hundred miles. We have explained that MCL 722.31 is the statutory equivalent of the "D'Onofrio factors" set out in *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), and adopted here in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). *Brown v Loveman*, 260 Mich App 576, 579 n 2, 586 n 3; 680 NW2d 432 (2004). We further explained that the focus of the "D'Onofrio factors," and, therefore, the focus of MCL 722.31, was different from the focus of the best interest custody factors considered in MCL 722.23. More specifically, the two tests are for alternate situations, not for use together. *Brown, supra* at

585. Because the trial court appropriately considered the “best interest” custody factors under MCL 722.23, it was not required to engage in an analysis under MCL 722.31.

Finally, plaintiff argues that the trial court’s findings under several of the best interest factors were against the great weight of the evidence. We disagree. Under MCL 722.23, the court must consider the following twelve best interests factors when ruling on a motion to change custody:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Plaintiff agrees that the trial court correctly found the parties equal under factors (a) and (g). Plaintiff also agrees that the trial court properly weighed factor (f) against her and properly declined to consider factor (i). Plaintiff does not present any argument regarding the trial court’s assessment of factor (l).

Citing the same record evidence, plaintiff contests the trial court's finding of equivalency under factors (b) and (h). However, plaintiff apparently misunderstands certain testimony about their minor daughter's educational achievement. The director of the Sylvan Learning Center that assessed the girl's educational progress testified that her scores ranged from "below average" to "getting close to average," depending on the test, not that her scores were generally getting better. The record shows that both parents are involved in their children's educational activities, and that both parents criticize each other's involvement. Although, as the court acknowledged, defendant's ability to pay for the girl's supplemental education is suspect, the record also shows that defendant's household is dedicated to promoting the children's education. We conclude the evidence does not clearly preponderate against the trial court's finding of equivalency on either factor.

Next, plaintiff argues that the trial court should not have favored defendant under factor (c). Specifically, plaintiff argues that the court focused too heavily on medical issues, to the exclusion of relevant non-medical issues. However, we conclude the evidence regarding the non-medical issues do not favor either party. Further, the evidence showed that plaintiff delayed in obtaining dental care for their daughter, failed to attend follow-up appointments concerning their son's medication, and unilaterally decided to take him off the drug without consulting a doctor. The evidence also suggested that plaintiff did not follow through on a plastic surgeon referral for their daughter until after defendant complained. We conclude, therefore, that the evidence does not clearly preponderate against the trial court's finding in favor of defendant on this factor.

We also find no merit to plaintiff's argument that the trial court erred in finding her environment unstable and unsatisfactory under factor (d). Although the children resided with plaintiff since birth, there was evidence that plaintiff has been arrested several times, has had serious behavioral problems with the children's half-sister, and faces possible incarceration for convictions of drunk driving and making a false statement to the police. While the Friend of the Court concluded that factor (d) favored plaintiff, it also concluded that plaintiff's environment was chaotic and "not as stable as it could be." Moreover, the trial court's determination was partly based on a finding that plaintiff's testimony was not credible, which is a judgment the trial court is in a better position to make than this Court. *Fletcher v Fletcher*, 447 Mich 871, 890; 526 NW2d 889 (1994). Therefore, the evidence does not clearly preponderate against the trial court's finding that this factor weighed against plaintiff.

Plaintiff also argues that the trial court erred in considering solely how long each party was with his or her current partner under factor (e). This factor focuses on "the child's prospects for a stable family environment," and "the circuit judge is to give careful consideration to *the whole situation*" and "must weigh all the facts that bear on whether [the parties] . . . can best provide [the child] . . . the benefits of a custodial home that is marked by permanence, as a family unit." *Ireland v Smith*, 451 Mich 457, 465-466; 547 NW2d 686 (1996) (emphasis added). Plaintiff's argument is premised in part on her assertion that defendant had no reason other than skiing to move to Colorado. However, his testimony, in part, was that he moved because of better educational and employment prospects, in addition to the fact that he allegedly lost his job in Michigan because plaintiff kept calling his employer to make false allegations against him. Although defendant's current wife was married three times before, plaintiff has also apparently had a series of boyfriends. Even if the trial court did not consider as much of the relevant

circumstances as it should have, any error was harmless because the evidence, on the whole, does not preponderate against a finding of equivalency under this factor.

Additionally, plaintiff argues that the trial court should not have found in defendant's favor under factor (j). She argues that she interfered with defendant's visitation time only twice, and one of those times was out of a concern for the children flying without an escort. However, visitation time is only part of the analysis. Plaintiff also apparently cut off telephone calls between defendant and the children, refused to answer defendant's telephone calls, encouraged the children to call her boyfriends "dad," made threats against defendant's wife, failed to communicate with defendant about the children, and accused defendant of "playing a game" when he went through the Friend of the Court. The trial court favored defendant only slightly on this factor, however, because it felt that defendant's wife may have been causing problems as well. The evidence does not clearly preponderate against that conclusion.

Finally, plaintiff argues that the trial court should have weighed factor (k) against defendant because, irrespective of the credibility of her own testimony, defendant admitted that he struck the parties' daughter.¹ Plaintiff notes that a finding of not guilty by a jury involves a different standard of proof than in a civil matter. In contrast, she asserts, there is no evidence plaintiff has ever engaged in physical violence. Plaintiff's first point, although true, improperly generalizes from a single incident. Nonetheless, it was a fact considered by the trial court. Plaintiff's second point fails because, in Michigan, "domestic violence" is not limited to *physical* violence. MCL 400.1501(d). At least some of plaintiff's behavior, including threats made against defendant and his wife and plaintiff's telephone calls to defendant's former employer, would constitute domestic violence in Michigan.

Therefore, the trial court did not commit any errors on the record, and we decline to consider any alleged errors not in evidence before us.

Affirmed.

/s/ Janet T. Neff

/s/ Michael J. Talbot

¹ The trial court apparently declined to give this factor any weight, despite defendant's admission that he struck Miranda.